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Please Don't Be My Neighbor: Civil RICO Claims against Marijuana Enterprises in *Safe Sts. Alliance v. Alternative Holistic Healing, LLC, Et Al.*, and Cases Like It

A rise in lawsuits alleging violations of federal RICO and narcotics laws against marijuana growers and related businesses in states that have legalized marijuana has caused a shudder in the industry. Marijuana businesses need to be aware of their growing litigation risks and take appropriate action to reduce their crop's exposure.

It was October 31, 2018, and less than a day of jury deliberations had passed. A Colorado jury in a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") action, *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, Civ. Action No. 15-349 (D. Colo.), filed Feb. 19, 2015, delivered its verdict. The jury was asked to decide whether marijuana cultivators and distributors and related parties were liable to their adjacent neighbors under civil RICO claims. The jury found in favor of the defendants, concluding that the plaintiffs had suffered no cognizable harm and, therefore, failed to establish their RICO claims.

Originally, claims also were filed against various Colorado state and county officials, including John W. Hickenlooper in his official capacity as Governor of Colorado. *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, 2016 U.S. Dist. LEXIS36115, *7 (D. Colo. Feb. 8, 2016). In the Second Amended complaint, the plaintiffs alleged injuries caused by the defendants' marijuana activities, including unpleasant odor on their land. *Id.* at *9-*10. Both the state and private defendants moved to dismiss.

The lower courts (the magistrate court and the district court) found that the state defendants should be dismissed. The Tenth Circuit agreed. It held that private parties had no right to enforce the Controlled Substance Act ("CSA"), 21 U.S.C. §§ 801-904 (the federal criminal law regulating controlled substances, including marijuana), against states without identifying an independent federal right. Since no such right existed, the action against the states could not stand. The court also found that permitting parties to litigate against states that legalized marijuana would interfere with the Department of Justice's CSA enforcement. *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, 859 F.3d 865, 902-04 (10th Cir. 2017).

As to the marijuana-growing defendants and their related entities, the magistrate judge found that the plaintiffs had not sufficiently alleged that they suffered business injuries. *Safe Sts.*, 2016 U.S. Dist. LEXIS36115 at *29. The plaintiffs' "broad generalization" that the marijuana business emitted foul odors that "marred the mountain views from the Reilly's property, thus making it less suitable for hiking and

horseback riding” and decreased the value of their property, were “conjecture and hardly equate to concrete financial losses.” *Id.* at *30-*31, *34. Because the plaintiffs failed to meet pleading and standing requirements for civil RICO, the claims had to be dismissed. *Id.* at *29-*30. The magistrate judge recommended that the complaint be dismissed with prejudice. *Id.* at *43 (footnote omitted). The district court adopted the magistrate judge’s recommendation. *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, 2016 U.S. Dist LEXIS 36113, *7, *9-*10 (D. Colo. Mar. 21, 2016).

The Tenth Circuit, however, reversed and held in a lengthy opinion that: (1) the growers could run afoul of RICO through their CSA violation, (2) the legality of their actions under state law did not shield them from civil RICO, and (3) the plaintiffs alleged actionable harm from the growers’ activities. *Safe Sts.*, 858 F.3d at 865, 876, 881. More specifically, the Tenth Circuit found that, while Colorado could repeal state criminal and civil penalties for marijuana enterprises, it could not “amend the United States Constitution or the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904, under which manufacturing, distributing, selling, and possessing with intent to distribute marijuana remains illegal in Colorado” (and every other state). *See U.S. Const. art. VI, cl. 2.” Id.* at 876 (footnote omitted). As a result of the Tenth Circuit’s ruling, the case moved forward to trial, resulting in a verdict for the growers and their associated entities.

While the growers prevailed this time, there is no guarantee that other marijuana enterprises will have the same success. Over the past three years, there has been an uptick in these types of litigations as more states continue to legalize marijuana.¹ And courts around the country also may move these cases forward to trial.

For example, in *Crimson Galeria Ltd. Partnership v. Health Pharms., Inc.*, No. 1:17-CV-11696 (D. Ma.), residents in Harvard Square filed suit, alleging anticipated injury by a state-licensed marijuana dispensary. The complaint was dismissed without prejudice because the marijuana dispensary had not yet opened at the time the suit was filed. But the court provided the plaintiffs with detailed instructions to revise their claims, assuring the plaintiffs that their RICO claims could move forward if they pleaded

¹ During the recent November 2018 elections, Michigan legalized recreational marijuana and Missouri and Utah legalized medicinal marijuana. Although North Dakota rejected a medicinal marijuana ballot measure, there are now 33 states with some form of legalized marijuana.

a relationship between the CSA violations and their alleged harm. The court also explicitly rejected a *Burford* abstention argument (where federal courts are asked to defer to state court rulings because there are important state-law questions at play), because state law was irrelevant when it came to evaluating violations of the CSA. The amended complaint was filed on October 5, 2018. On November 9, 2018, the residents dismissed their complaint with prejudice.

In a case with facts similar to *Reilley’s*, plaintiff neighbors in *Bokaie v. Green Earth Coffee LLC*, No. 3:18-cv-5244 (N.D. Cal.), brought civil RICO claims against marijuana growers in August 2018. A motion to dismiss is pending, and while that motion highlights the policy implications (“Plaintiffs have seemingly taken it upon themselves to police alleged conduct explicitly authorized by state law and on which the federal government has consciously decided not to intrude . . .”), the focus of the defendants’ attack there is that there are no RICO-actionable damages. The motion will be argued on December 20, 2018. *Id.* at Docket No. 32.

In *Underwood v. 1450 SE Orient, LLC*, No. 3:18-cv-01366 (D. OR.), a property owner adjacent to a facility manufacturing marijuana-infused candy and other edible products has brought her own civil RICO claim. *Id.* at Docket Nos. 1-5 (July 20, 2018). The plaintiff sued 226 defendants, alleging that the marijuana business negatively impacted her enjoyment and the market value of her property and has burdened her with noxious odors. *Id.* A motion to sever and dismiss was filed on November 13, 2018. The motion argues that there is no sufficient connection among the defendants, and joining them is irreparably prejudicial. *Id.* at Docket No. 193.

Civil RICO also may be applied to other disputes involving marijuana businesses. For instance, in *Old Woodward Housing, LLC v. Greenhouse Leasing Co.*, No. 2:15-cv-13778 (E.D. Mich.), the court allowed disillusioned investors to file an amended complaint pleading civil RICO against the marijuana business in which they had originally invested.

The message to marijuana business legal under state law is clear: unhappy neighbors may be coming for you, and courts around the country may let those cases proceed. Some strategies to avoid the risks of private lawsuits (putting to one side that all marijuana enterprises are still at risk of criminal prosecution by the federal government

under the CSA) include documenting how your presence benefits the businesses around you and, in the instance of growers, monitoring and minimizing any bad effects of your marijuana business. Where possible, if the alleged bad effects can be attributed to other legal agricultural or business uses, your marijuana farms and facilities will be safer from litigation. Most importantly, when selecting where to place your marijuana business, be aware of who is in your neighborhood and how they are going to receive your new enterprise.

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